SUPREME COURT, U.S.

JAN 8 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM
No. 73-1029

JOSEPH DAVIS,

Petitioner,

-against-

AMERICAN EXPORT ISBRANDTSEN LINES, INC., and S.S. EXPORT COMMERCE, her engine, tackle, cargo, gear, and apparel,

Respondents,

-and-

TODD SHIPYARDS CORP.,

Third Party Defendants

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT

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Opinion in District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOSEPH DAVIS,
Plaintiff,

-against-

AMERICAN EXPORT ISBRANDTSEN LINES, INC., and S.S. EXPORT COMMERCE, her engines, tackle, cargo, gear and apparel,

Defendants.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Third-Party Plaintiff,

-against-

TODD SHIPYARDS CORP.,
Third-Party Defendant.

JACOB RASSNER, Esq., for Plaintiff.

DAVID P.H. WATSON, Esq. (Messrs. HAIGHT, GARDNER, POOR & HAVENS, of Counsel) for Defendants and Third-Party Plaintiffs.

THOMAS H. HEALEY, ESQ. (Messrs. DARBY, HEALEY, STONEBRIDGE & WHELAN, of Counsel) for Third-Party Defendant.

DOOLING, D.J.

Plaintiff, an employee of the Third-Party Defendant Todd, was seriously injured on June 29, 1970, while he was working as a machinist about the task of pulling the tailshaft and replacing the propeller of the S.S. Export Commerce. The plaintiff's injury was sustained at about 8 P.M. on June 29, 1970, when the propeller of the vessel, which had been "jumped" on the tailshaft and was resting on it, unexpectedly slid off the tailshaft, struck the staging on which plaintiff and his co-worker Olenyk were working and knocked them down to the deck of the drydock some dozen or 15 feet below. Plaintiff charges the ship with unseaworthiness and the shipowner with negligence.

While the vessel was in drydock, there is no claim that it was out of navigation. The defendants however do contend that plaintiff was not entitled to the warranty of seaworthiness, that no unseaworthy condition was shown and that no negligence on the part of the ship or shipowner was shown.

The Export Commerce arrived at drydock No. 8 at Todd Shipyard at 5:40 in the morning of June 29. It was in the drydock and on the blocks by 8:20 in the morning and the drydock itself was dry at 9:45 in the morning. The vessel was at Todd for routine maintenance, including drawing the tailshaft, which carries the propeller or wheel, into the hull through the tube communicating through the skin of the ship, so that the shaft could be put through its triennial A.B.S. inspection and Coast Guard check. The wheel was being replaced at the same time by a reconditioned wheel.

As the case turns on the process by which a wheel is detached from the tailshaft so that the tailshaft can be pulled into the vessel for inspection, the process has to be described in some detail.

The propeller or wheel of the S.S. Export Commerce weighed about 47,000 pounds. The shaft to which it, in this respect

similar to other propellers, was fastened had taper throughout that part of the tailshaft which would be covered by the hub of the propeller when the propeller was in place. Beyond the outer edge of the hub of the propeller the "bitter-end of the shaft was threaded to take a large nut of special configuration which weighed from 500 to 1000 pounds. In addition there was a fairwater cap which fitted up against the outer end of the hub of the propeller and was rounded and tapered so as to present a streamlining structure, like a rounded cone. The cap is bolted to the hub by means of bolts which are threaded into the hub (in a fore and aft direction) and extend into the cap and emerge in recesses in the cap in which the nuts that fasten to the outer end of the bolts can be seated. When the cap is fastened down to the hub the recesses in which the nuts are seated are then cemented up.

To get the propeller off the shaft the procedure is first to knock the cement out of the cap recesses so as to expose the nuts, undo the nuts, remove the cap and then start to take off the big nut at the bitter end of the tailshaft. A special wrench is used for this which is not adjustable but is, in effect, custom made for each shaft — so much so that a vessel carries that wrench with it as part of its gear. When the cap is off, it is then necessary to get the propeller itself to let go of the tailshaft.

It has been said the tailshaft is tapered throughout that part of its length which is embraced in the depth of the hub. When the propeller is put on the shaft it is driven home and is retained in place during service at sea in some very considerable part by the tightness of the annular grip of the propeller on the taper of the tailshaft. The propeller is prevented from slipping on the shaft when the shaft is driving it by a key and keyway. The nut applied at the bitter end of the shaft of course is also an element in fastening the propeller to the tailshaft. The propeller is brass or bronze throughout and the tailshaft is a hardened steel so that

the interface between propeller and shaft is bronze to steel. The hub of the propeller is fitted with threaded holes running fore and aft and parallel with the tailshaft; they are exposed to view when the fairwater cap has been removed. Into the threaded holes can be inserted "drawbolts" which are threaded at both ends, and which are longer than the protruding bitter end of the tailshaft. When the cap has been removed, the draw-bolts are inserted into the hub of the wheel; they protrude aft, parallel to the bitter end, and they extend beyond the outermost extremity of the bitter end of the shaft. Beyond the bitter end a strong-back is then fitted which bridges across from one draw-bolt to the other, and nuts are placed at the outer end of each draw-bolt to hold the strongback in place across the butt or bitter end of the shaft. Then in between the outer extremity of the bitter end of the tailshaft and the inner face of the strongback is inserted a box wedge, an expandable wedge assembly into which a wedge can be hammered so as to put strain on the draw-bolts and hence to set up a parting strain between the strongback and the butt or bitter end of the shaft, so that as the wedge is driven into the box wedge the draw-bolts pull on the hub of the propeller so as to break the seal between the propeller and the tailshaft.

The evidence is reasonably clear, subject to what is said later with respect to the testimony of Captain Swensson, that ordinarily the mere application of turning or wedging force to the ends of the draw-bolts would not suffice to pull the propeller bitter end of the tailshaft. When the cap has been removed, the draw-bolts are inserted into the hub of the wheel; they protrude aft, parallel to the bitter end, and they extend beyond the outermost extremity of the bitter end of the shaft. Beyond the bitter end a strong-back is then fitted which bridges across from one draw-bolt to the other, and nuts are placed at the outer end of each draw-bolt to hold the strongback in place across the butt or bitter end of the shaft. Then in between the outer extremity of

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The evidence is reasonably clear, subject to what is said later with respect to the testimony of Captain Swensson, that ordinarily the mere application of turning or wedging force to the ends of the draw-bolts would not suffice to pull the propeller off the tapered tailshaft by sheer mechanical force. The practice, therefore, is to apply heat to the bronze hub for a period from ten minutes to perhaps as much as an hour so that the hub expands with the heat more quickly than the tailshaft. At a point the strain exerted through the strongback and box wedge assembly can start or jump the propeller on the shaft, breaking the annular grip of the hub on the shaft. That step of finally getting the propeller to budge along the shaft is called "jumping" the wheel. The evidence is that the jump is modest, say a quarter of an inch and not more than a half inch. The grip of the propeller on the shaft, that is, is broken but the propeller does not slide off in ordinary experience.

The next step is to secure the propeller so that the tailshaft can be drawn out of the hub and into the hull for inspection, leaving the propeller suspended. Usually wires or wire straps are wound round and round the hub and fastened to chains, which in turn are fastened to padeyes fixed in the hull of the vessel above the propeller and under the ship's counter or quarter. The padeyes or eye pads are designed for the sole purpose of supporting the propeller in a chain and wire arrangement for the required periodical drawing of the tailshaft for inspection, as

well as for inevitable occasions of wheel replacement. (There are two other padeyes or eye pads similarly disposed under the counter to support the rudder when it has to be removed.)

One question in the present case is, was the usual, or customary, and correct procedure used in jumping the wheel? That is, should the wheel be secured by chains to the overhead padeyes, or otherwise secured against movement on the shaft, before the wheel is "jumped", so as to prevent it from sliding off the tailshaft, or should it not? An alternative to chains in the overhead padeyes, it is intimated, was preventer chains of lighter weight — that could not support the whole weight of the wheel — fastened to the same part of the drydock and supposedly adequate to prevent the wheel's moving and slipping off the tailshaft. In the present case neither of these steps was taken.

The testimony is that on the night in question the procedure had been carried to the point where heat had been applied to the hub by plaintiff and his fellow machinist, Danny Olenyk, the strongback was in place, the box wedge was in place and the wedge had been hammered home to put strain on the wheel. The wheel had "jumped", and not any unusual distance so that the jump was some quarter to half an inch, and the wheel remained on the shaft. For an unexplained reason, according to plaintiff's evidence, a delay of ten minutes ensued while plaintiff and Olenyk awaited the rigger crew which would attach the chains to the wheel with the wire rig. For no evident reason and before the riggers came, the wheel slid off the shaft, struck the staging and knocked plaintiff and Olenyk to the deck.

Plaintiff testified that in the interval of waiting he removed or started to remove one of the draw-bolts from the strongback, but there is a substantial question as to whether this is a rationalization or reconstruction on his part, for he had not testified to that during the taking of his deposition. On the contrary, his testimony appeared to exclude his having any

recollection of any such occurrence, and his testimony about it was at best somewhat uncertain.

The evidence is that the chains had already been fastened to the padeyes above the propeller under the ship's counter but had not yet been wired to the propeller. The testimony is that there were no other preventer chains, nor any other means employed to prevent the propeller from slipping aft. The evidence is that the nut had been completely removed, and that it had not just been loosened and turned back enough to allow the wheel to jump without going off the end.

Plaintiff introduced no expert testimony to illuminate the physics of the problem. Plaintiff rather introduced, as testimony of the usual practice, his own testimony, and that of a fellow employee, Ernest Jackson, that of Captain Julius F. Swensson and that of Earl LaGarde. Mr. LaGarde, a Todd employee, testified that the procedure, as described by the evidence, was standard procedure followed in 90 or 99 cases out of a hundred. He was clear that a jumped wheel does not move more than a quarter inch to a half inch or so at most, and that it is expected — on an empirical basis — to start about a quarter inch. He testified that the overhead chains used to support and lower the wheel after it has been started and the shaft drawn, are not wired to the wheel during "jumping" because the intense heat in which the blowtorches envelop the hub is too great for the wire cable; he indicated that the heat would so weaken the wire winds or straps as to render them unsafe for supporting the 23-1/2 ton wheel. LaGarde explained that there was so much room between the outer or aft edge of the strongback and the inner edge of the rudder that the wheel can fall off, that the yard cannot rely on the strongback and wedge box assembly to act as a stopper between the bitter end of the shaft and the rudder.

Captain Swensson had been going to sea since 1903 and had shipped in steam since 1928; he held a Master's ticket good for all seas and all ships; he had been a shipowner as well as a shipmaster. Although he is not himself skilled in engineering matters or in jumping propellers, he had seen the operation performed a number of times. He testified to the use of chains to support the propeller during the jumping procedure at sundry shipyards, but his testimony was principally, if not exclusively, about cold jumping of the wheel without use of any heat. He testified that in these instances the yard jumped the rudder by applying wedge block and draw-bolt strain alone. He said that he saw heat used in one case in Marseilles in 1966 and had seen it used three or four other times to ease an assembly before jumping, but he was unclear as to whether or not the procedure involved was like that described by Mr. LaGarde.

Mr. Jackson, and to a somewhat uncertain extent the plaintiff himself, testified that Todd in its regular practice did not use the overhead chains and wire rigging to restrain the propeller until after the "jump", and that Todd did not use them during the heating process, to this extent agreeing with LaGarde. But they appeared to say that other, much lighter chains were applied fore and aft of the propeller before the heating to contain linear movement on the jump; Mr. Jackson indicated that the chains that he was talking about would have been secured to padeyes on the drydock wall and/or to the drydock keel support blocks below the propeller. There was no evidence that there was at any time any practice of simply loosening the nut at the bitter end of the tailshaft by an amount roughly equal to the expected jumpas a means of limiting the jump of the wheel.

The testimony on this point of plaintiff and Mr. Jackson must be rejected. It was unimpressive in itself. Moreover, the plaintiff's answers to interrogatories 6 and 7 of the third-party

defendant contain no reference to the point, and it is not included in the fully drafted fault allegations of paragraph ELEVEN of the complaint. Plaintiff's contention that preventer chains were normally used must be rejected.

It is concluded that the practice adopted and used without material exception at Todd was used on the occasion of the accident and that plaintiff has not shown that it is in any way negligent or inadequate or that it created a condition of transitory unseaworthiness.

There is no evidence that the shaft or the wheel, the hub, the fairwater cap or any other part of the assembly had any defect in design or assembly or in condition.

The defendants contend that plaintiff is not in any case entitled to the warranty. Captain Swensson testified on the question of whether or not the work of jumping a wheel could be considered traditional seaman's work, even if at the present day it may be done by specialist landside teams. The Captain's testimony demonstrated the opposite of plaintiff's contention. It appears that ships engaged in foreign trade often or usually carry spare propellers with them to facilitate replacement in foreign ports, and it also appears that normally a vessel will carry a wrench to fit the nut for the bitter end of the tailshaft. Beyond that the other equipment necessary to change a wheel is not carried on shipboard. The blow-torches used to heat the hub, the evidenced shows, are outsize, heavy-duty heaters capable of encasing the wheel hub in intense heat, and the evidence intimates that the ordinary welding blowtorches that could expectably be aboard freighters could not lift a hub to jumping temperature because of the heat loss from the wheel surface. Captain Swensson indicated that strongbacks were not unknown on shipboard, and there was an indication that each wheel has its own draw-bolts that were used on the Export Commerce, and those of many other vessels, were kept in store at Todd and were

not on shipboard. The strongback used was Todd's, the box wedge used was Todd's, and the evidence suggests, and there is no contrary evidence, that all this equipment was kept normally in the shipyard and not aboard ship.

No one knew of a case in which a ship's crew had jumped a wheel. Captain Swensson went only so far as, in effect, to say that he couldn't see any particular reason why a crew could not undertake the job. He said no more than that any crew of ablebodied handymen could do the job under right supervision. Indeed there appears to be only one instance in which a propeller was reportedly changed by a ship's crew, and the incident was remarkable enough to become a little legend.

The conclusion is inevitable that the jumping of a wheel was not ship's work or crew work either in tradition or in current practice. In this situation, no help is gained by reference to an extended concept of crew work which would define it in terms of the overall nature of the whole job undertaken at Todd and de-emphasize the nature of the subordinate activity within that whole. In a generalized sense drawing a tailshaft is related to ship maintenance and certification, but it is not an operation that could normally be done at sea, and is sufficiently specialized to remove it from the class of activities analogous to crew activities and in that sense entitling the workers involved in it to the warranty of seaworthiness. It is peculiarly a shipyard kind of work, is work on the vessel rather than work of the ship, and work done by outsiders to the vessel and not crew work normal to the ship.

Finally, there is no evidence that the shipowner and the ship's crew were aware of or competent to form a judgment about the operation involved. Unquestionably the entire ship's crew was still assigned to the vessel, and they were on the payroll throughout the entire but brief stay of the vessel at Todd. That fact has much to do with regarding the ship as still in navigation

but nothing to do with whether or not error in the pursuit of the work of jumping the wheel involved or could involve any negligence on the part of the ship. The work was wholly committed to Todd and the interest of the vessel owner and those in responsible charge of the vessel was not in the performance, direction or supervision of the work, but only in checking the adequacy of Todd's completed performance of it. The shipowner, and those others responsible for the ship's safety at sea, would have an interest in seeing that the shaft was in good order and the wheel properly restored to the shaft, just as would the certifying authorities. But they would not have either a right or duty nor would they have the skill to participate in or to direct the execution of the work. What might have been the responsibility of ship's crew if they had seen something done which manifestly endangered someone in plaintiff's oosition is not raised by the case. There was no evidence that any ship's crewman was on hand at the time, or either was or should have been in a position to have observed the existence of the condition involved, or to have understood whether or not a danger was present. Neither plaintiff nor Olenyk saw any condition of danger; they did not give any warning.

The accident then is unexplained. The evidence discloses no cause for the slippage of the wheel. No change from the moment of the safe "jump" was referred to except the dubious testimony that plaintiff might have removed or started to remove a drawbolt in the ten minute interval after the jump. Even if *res ipsa loquitur* be invoked, it would not be directed to the ship or its owners but to Todd, which was in charge of the work on its own drydock and under its sole supervision. Where, as in *Gibbs v. Kiesel*, 5th Cir. 1967, 382 F.2d 917, "unexplained" accident is found to disclose unseaworthiness, the terms of the accident are such as to imply a defect in structure (as in *Oliveras v. American Export Isbrandtsen Lines*, 2d Cir. 1970, 431 F.2d 814), or — as

in *Gibbs* — a defect in rig. Here, the accident implies nothing of defect: no inference of structural defect nor of operational conduct that could produce the event arises from its happening. Nothing failed in service, no causative condition or event or mechanics-of-happenings appeared or is inferable. Something may have been done at the time of the accidcent which is lost to recollection. It is certainly not in the evidence. In any case, no cause of action is made out against the ship or its owners.

In the circumstances it would serve no useful purpose to make findings with respect to the plaintiff's injuries, which are totally disabling so far as can be seen, in view of his age, the gravity of the injury, and the absence of any suggestion that any alternative employment is available to him.

It is concluded that plaintiff may not recover and that defendant is entitled to judgment that plaintiff take nothing, and that the complaint is dismissed on the merits.

Questions as between defendant and third-party defendant have been reserved. Both the defendant and the third-party defendant rested when plaintiff rested; defendant and third-party defendant must promptly advise whether they have settled the issues between them so that final judgment can be entered.

It is

ORDERED thst when the case is ready for final judgment on all claims involved the Clerk enter judgment that plaintiff take nothing and that the action of the plaintiff against the defendants is dismissed on the merits.

Brooklyn, New York
November 28, 1972

s/John F. Dooling
U.S.D.J.

ORDER OF CIRCUIT COURT AFFIRMING

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of October one thousand nine hundred and seventy-three.

Present:

HON. J. JOSEPH SMITH
HON. WALTER R. MANSFIELD
HON. JAMES L. OAKES
Circuit Judges,

73-1372
Joseph Davis,
Plaintiff-Appellant,

v.

American Export Isbrandtsen Lines, Inc., and S.S. Export Commerce, her engines, tackle, cargo, gear and apparel,
Defendants-Appellees.

American Export Isbrandtsen Lines, Inc.,
Defendant & Third-
Party Plaintiff,

v.

Todd Shipyards Corp.,
Third-Party Defendant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

By s/Vincent A. Carlin
Chief Deputy Clerk